

**AN ARBITRATION UNDER AUSPICES OF THE
CALIFORNIA STATE MEDIATION AND CONCILIATION
SERVICE**

KENNETH BULL, Grievant)	
And)	Case # ARB-02-1033
CITY OF LIVE OAK, Employer)	(C.S.M.C.S.)
(Sutter County, California))	
_____	/	

DECISION

Appearances:

Etan E. Rosen, Sacramento, CA, for the Grievant.

Brant J. Bordsen, Marysville, CA, for the City of Live Oak

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**David G. Heilbrun, Arbitrator (As Selected from a California State
Mediation and Conciliation Service Panel, San Francisco, CA)**

I. - INTRODUCTION

This begins an advisory “judgment” that concerns Kenneth (Ken) Bull having been terminated from employment with the City of Live Oak, California. Bull had an overall employment span with the City of Live Oak (hereafter “City”) of approximately four years.

The City, a California municipal corporation, is governed by a City Council (hereafter “Council”). The Council determines how public business is to be fulfilled, and how community services are to be provided. A City Manager administers all affairs necessary to successful implementation of public business objectives, and reliably provided community services of a traditional nature. The City Manager is ultimate supervisor of all City employees.

One of the City's operating departments is that of Wastewater Treatment; frequently also termed the sewage treatment plant. Bull had been employed most extensively in this department. It is a highly regulated activity, specifically within purview of the federal Clean Water Act and the California Regional Water Control Board, Central Valley Region (hereafter "Control Board") at Sacramento.

On August 7, 2002, the Council adopted its Resolution 28-2002, comprising a new version of Personnel Rules and Regulations from those previously existing. These "City of Live Oak Personnel Rules and Regulations" (hereafter "Rules") contain thorough language defining words and phrases used the Rules, and establish, in both a substantive and procedural sense, practically all treatment of City employees' compensation, working conditions, hire and retention that could be imagined. Rules Section 17.0 – "DISCHARGE . . . RIGHT OF APPEAL" – comprises that portion which is most closely involved in this Decision regarding Bull's termination from employment.

A. - OVERVIEW

A municipal wastewater treatment facility processes sewage into distributable non-potable water and disposable solid residue. Employees at a treatment plant operate and monitor sewage flow and treatment in a largely automated setting.¹ Oversight of this City function is reserved to the Control Board's Sacramento office. This authority receives and reviews all instrumentation readings and laboratory reports that appear as daily and, where appropriate, summarizing weekly or monthly numbers.

After brief initial employment with the City, Bull then acquired the position of Senior Maintenance Worker at the sewage treatment plant, to which his Grade II Certificate of Competence applied. Attainment of higher numbered licensing is conferred by more rigorous study, training and experience, with the highest category being Grade IV. Bull was also soon issued a Grade 2 Water Treatment Operator Certificate after assuming his new position.

An 18-page "Standard Provisions and Reporting Requirements" document of the Control Board's guiding and mandatory principles for wastewater operations, of March 1, 1991, (hereafter "SPRR") applied to this City function. In April 1999 the Control Board issued its extensive Order No. 99-008 to the City, entitled "Waste Discharge Requirements." This was based on the Control Board's review of 1997 sewage operations data from the City. Order 99-008 was supplemented, also on 30 April 1999, by the Control Board's second Order No. 99-009 entitled "Requiring the City of Live Oak Wastewater Treatment Plant Sutter County to Cease and Desist From Discharging Contrary to Requirements," and in which further City operating reports dating from 1992 were referenced.

¹ An extensive treatise of 20 Chapters and three Appendices provides detailed elaboration on this subject. Spellman, Frank R., *Spellman's Standard Handbook for Wastewater Operators*, Vol. 1, Fundamental Level, Lancaster, PA, Technomic Publishing, 1999.

B. - BASIS OF THE PROCEEDING

This matter is exclusively controlled by applicable language set forth in the City's current Rules. Pertinent excerpts of this document include:

"Section 17.5 Causes for Discipline. Any of the following causes are sufficient causes for . . . dismissal . . . (b) Unsatisfactory performance . . . (c) Unexcused neglect of duty . . . (n) Negligent or willful damage to public property or waste of public supplies or equipment . . . [or] (t) Any other good cause for discipline."

The continuing excerpts that follow are in Rules Section 17.6 Right of Appeal and Section 17.8 Findings [after a Hearing]:

"Any regular employee, other than a probationary employee, who is . . . dismissed, may appeal . . ." (Section 17.6 A.). "In the event an agreement regarding disposition of the matter cannot be reached [between the parties] . . . [a] person shall be the arbiter." (Section 17.6 C.).

"The arbiter shall render his/her judgment as soon after the conclusion of the hearing as possible The opinion shall set forth findings of fact and conclusions of law. The opinion shall be advisory only." (Section 17.8 A.).

The "advisory" character of an arbiter's opinion may lead to further highly structured procedures, wherein the parties possess options that could trigger a responsibility of the City Council that it " . . . will review the transcript of the proceeding, and shall based upon such review, adopt, amend, modify, or reject [the opinion]" (Section 17.8 D.).

C. - CONTEXTUAL SETTING

The facility of concern here is a Class 2 wastewater treatment plant (hereafter "WWTP"). By this classification it requires, at a minimum, that its Chief Plant Operator be the holder of a correspondingly significant Grade II license. Organizationally, WWTP is within the City's Department of Public Works. The responsibilities of this Department touch most aspects of urban living; prominently as to constant WWTP functioning, water service, basic city infrastructure, road and facilities maintenance, parks and swimming pool. Reliable operation of the WWTP is deemed number one in importance to the safety, health and general welfare of City residents.

The City's WWTP consists of a clarigester (a large mechanical device that screens out solid content of City sewer flows into the plant), two aeration lagoons, twelve oxidation ponds, a concrete chlorine contact structure, and a final detention/sedimentation basin. The resultant sludge from all WWTP intake is ultimately "dewatered in drying beds and then land applied on site." (quoting Control Board's Order 99-008). The remaining effluent is then discharged as treated municipal wastewater to a Reclamation District and a river tributary.

A Control Board hierarchy exists at Sacramento, possessing important oversight, inspection, and regulatory authority over this WWTP. Besides executive officials identified variously as "Chair", "Executive Officer", and "Senior Engineer", other personnel of the Control Board worked more closely and routinely with City WWTP functionaries.

One of these Control Board contact persons had been Christyl Escarda; identified as "Area Engineer" and shown to be principal recipient at Sacramento of numerous operating reports generated by WWTP personnel. The majority of such submissions of data to Escarda, after entry of a Chief Plant Operator's certifying signature, was Discharger self-monitoring reports (hereafter "DSMRs"). These were to accurately contain primary physical and chemical consequences of WWTP processing that spanned intake, influent, settling, aeration, disinfectant, laboratory results, effluent composition and discharging onto land or waters.

D. - EXPECTANCIES OF OPERATION

The SPRR serves to implement federal Clean Water Act provisions, and, more particularly, the California Water Code plus pertinent state regulations. A publicly owned "Discharger", such as this City's WWTP, is subject to further regulation by California's PUC. This agency issues appropriate certificates for the size, condition and specific purpose of a particular sewage treatment plant.

Dischargers are expected to properly operate and maintain their facilities and systems of treatment. This expectancy includes laboratory controls, quality assurance procedures, and installation of auxiliary backup features. In reality a composite had been created by the Control Board's simultaneous issuance of its Orders Nos. 99-008 and 99-009, including the latter's express "CEASE AND DESIST" component. The most significant operational requirement of this composite addressed the taking of effluent sample readings, in a striving for compliance with "Effluent Limitations", plus a specific protocol for such monitoring. In close importance this WWTP was also to fully abide "Receiving Water Limitations", "Discharge Provisions", "and limits on "Sludge Disposal."

Operations had the related expectancies of capping risky concentrations of pollutants (elementary metallic chemicals), and controlling turbidity, toxicity, undesirable residual biological communities, and visual abominations. Those employed in running the sewage plant, and primarily a designated chief plant operator, were also to avoid nearby groundwater degradation, and make periodic institutional reports beyond routine daily DSMRs. In practical terms most attention applied to constituents "Settleable Materials", "Chlorine Residual".(at contact basin), "Effluent Chlorine Residual", "Effluent pH", "Effluent's Total [fecal] Coliform" ("coliform" is dictionary-defined as, ". . . any of several bacilli; found . . . in the large intestines of humans"), "Total Suspended Solids" (TSS), and "BOD" (basic oxygen demand). A critical target of the process was to achieve an 85% "removal rate." When a continual measured ratio between beginning influent flow TSS and BOD readings versus end process readings of effluent flow for content remaining showed 15% of these specific Group I pollutants, the target was met.

II. – FINDINGS OF FACT

A. - PROFILES OF WITNESSES

John Linhart was employed by the City on July 1, 2002, to be its Planning and Public Works Director. He participated closely in Bull's termination.

Larry Johnson was employed by the City on September 14, 2001 as a Wastewater Plant Operator. He testified to holding "a Grade I and Grade 2" California certificate, but did not specify if these were for wastewater operations. Johnson is at places in the record referred to as an "Operator-in-Training" (OIT). He remained currently employed with the City at the time of hearing on March 5, 2003. Johnson had given a written, pre-hearing statement, which was admitted into evidence along with a short supplement dated March 3, 2003.

Roy Mora was employed by the City on October 15, 2001 as next Wastewater Plant Operator. He has experience in the field; last working in this occupation up until seven years ago. He holds a Grade I Wastewater Treatment Plant Operator Certificate. He also remained currently employed with the City at the time of hearing. Mora had given a written, pre-hearing statement, also admitted into evidence along with a short supplement dated March 3, 2003.

Dale Klever was employed by the City on January 17, 2002 to be the City's Chief Wastewater Plant Operator. He has worked in this occupational specialty for many years, and possesses a WWTP Grade IV Certificate. Following his hire, Klever's experience and innate ambition slowly steered the City out of serious non-compliance with the Control Board's SPRR.²

Ken Bull was employed for the first time by the City on July 22, 1998, classified as a Maintenance Worker I and joining the small Public Works crew. On or about March 17, 1999 Bull was promoted to a position as Lead Maintenance Worker II. Simultaneously, by letter of that date, the City's Public Works Director at the time wrote to the attention of Escarda at the Control Board's Sacramento office. This letter advised of the City's designation of Bull to be WWTP "Chief Plant Operator"; that he possessed an applicable Grade II Certificate; that Bull was authorized to sign DSMRs; and that the letter of notification was done in keeping with SPRR provisions. Further profiling of Bull is deferred to the section of this Decision in which respective versions of Bull and City Manager Robert (Rob) Hickey are set forth in detail as to DSMRs; plus the handling of Orders 99-008 and 99-009, numerous operational happenings, Bull's dealings with the constituent WWTP crew during years 1999 – 2001, and related matters.

² Circumstances of such non-compliance, expressly referred to now for the first time in this Decision, are assertively blamed on Bull by City Administration. Such belief in his blame comprises the chief issue of this case; that is with respect to whether "sufficient cause" existed for Bull's termination from employment.

Robert Hickey was first employed by the City in late October, 1999 to be its City Manager. Hickey summarized his duties as, “overall responsibility for all areas of the City [and specifically inclusive of] Parks and Recreation, Administrative Services and Public Works.” Again, further profiling of Hickey shall be deferred until his version of happenings is recited below.

David Mackowiak is a self-employed Human Resources Consultant. He has an extensive background in this field, and was called by the City to give “expert” testimony. Mackowiak had been summoned in by the City for advice, when discipline of Bull was under consideration in late summer 2002. Mackowiak disclaimed having any role in reaching a disciplinary decision as to whether or not Bull’s asserted offenses were of a severity warranting termination. He offered a current opinion on the circumstances as known to him, believing that Bull’s termination had been for sufficient cause and was procedurally valid.

B. – BACKGROUND FACTS

The City’s job description for a “Senior Maintenance Worker”, as established April 1998, states the following as its “Definition”:

“Under general direction, performs a wide variety of maintenance, repair, and construction work on City streets, storm drains, water and sewer system operations, parks, buildings and other City facilities; provides operational support of water/wastewater treatment plants and services; and other related work as required.”

This same job description continues with a statement of “Distinguishing Characteristics.” It reads:

“This is a single position classification in which the incumbent reports directly to the Public Works Director or his/her designee. Work is performed at the advanced journey level, supervising the activities of a number of maintenance personnel within the assigned framework of the unit. The incumbent may supervise other Maintenance Workers and is assigned the more difficult work, related to the City maintenance responsibilities.”

Other portions of this 3+ page job description contained further language pertinent to the chief issue here. Excerpts are from (1) “EXAMPLES OF DUTIES” as “Performs operational and monitoring activities at the City’s water/wastewater treatment facilities; performing routine sampling and testing of water/wastewater, adjusting chemicals as necessary, and recording results and findings,” and (2) “EMPLOYMENT STANDARDS” as (A) having knowledge of “Water/wastewater treatment plant and systems{,} operations and maintenance,” and (B) having ability to “Supervise the operations and maintenance {of} the City’s water/wastewater treatment plant operations and related systems.”

Hickey completed a total of three performance evaluations (formally headed "Planning and Performance Evaluation for Managerial/Professional Staff) on Bull. These were, respectively, for periods of (1) 7/20/99 to 7/20/00 (as to evaluation) and 7/20/00 to 7/20/01 (as to planning); (2) June 20, 2000 to February 28, 2001 (evaluation) and February 28, 2001 to June 20, 2001 (planning); and (3) 2/ 28/01 to 10/8/01 (evaluation) and October 2001 to February 2002 (planning).

These extensive 5-part performance evaluations (1) defined the letter grades used throughout; (2) briefly summarized the responsibilities critical to Bull's position; (3) listed numerous abilities and characteristics that would assertively contribute to Bull's job performance; (4) specified goals needed to "enhance job performance"; and (5) contained an ending portion for acknowledging signatures plus notice of Bull's right to respond in writing to the evaluation.

The first set of evaluations was rendered on September 8, 2000. It contained a rating of "Good" as to 2 responsibilities, generally being planning and oversight in nature, and "Needs improvement" as to 3 others, generally being direction of City-wide programs, training of personnel, and supportive leadership. In the treating of more specific abilities and characteristics, Hickey rated Bull "good" in 5 areas, "need improvement" in 9 and having an **Overall Performance Rating** of "N" for needing improvement. Hickey added a half-page narrative of other comments and examples in support of the overall rating he chose to give.

The second set of evaluations was rendered on February 28, 2001. Here the first rating group as to job responsibilities was reversed, with 3 as Good and 2 as Needing improvement. Regarding abilities and characteristics, Hickey issued 6 good ratings and 8 as needs improvement. Following **Overall Performance Rating** judged as "G" (Good) for this second set, Hickey wrote a 10-point list of comments and examples. As to wastewater treatment operations, directly or indirectly, this elaboration was a reminder to accomplish occasionally delinquent reports, that he "strive for perfection" in avoiding "out of tolerance" sewer test results, and to generally improve morale and motivation in the department. Hickey qualified Bull's "Good" rating here with the following **Overall Summary**:

Your performance has improved since your last evaluation and although I have rated you satisfactory in various areas, you made exceptional efforts in other areas. Therefore, I am approving three (3) months of retroactivity [pay], though your overall performance was not consistently standard or exceptional. It is the effort you made that I am impressed with. Your 5% merit increase that was delayed pending this review will be granted accordingly. Keep up the efforts!

The third set of evaluations was rendered on October 25, 2001. In a marked downward reversal, Bull was shown "Unsatisfactory" in 3 areas of responsibility and "Needs improvement" in 2 others. In the 14 categories of abilities and characteristics, Hickey's rating was unsatisfactory in 7 regards (job knowledge, quality & quantity of work(2), planning & organizing, dependability, delegation & supervision, and factor of judgment), plus needing improvement in 7 other areas.

Hickey again added extensive commentary to an **Overall Performance Rating** of “U” (Unsatisfactory), and wrote the following **Overall Summary**:

Your performance has dropped to an “Unsatisfactory” rating. Your ability to plan, organize, direct, coordinate, and control is Unsatisfactory and needs immediate improvement. You clearly struggle with many of the lead responsibilities your job requires. You need to continue to avail yourself of seminars and courses in the areas of communication and project management. In summary, your overall performance does not merit a salary increase at this time. I am dismayed and disappointed . . . since I noted in your last evaluation that you [had] improved from a prior evaluation and I had awarded you a retroactive merit increase.

Bull made the invited written response to this third evaluation by Interoffice Memo dated October 31, 2001. An introductory sentence asserted that Hickey had introduced “. . . inaccuracies and more subtle inconsistencies . . .” into an evaluation process, which warranted bringing them into “proper perspective.”

Bull’s responsive narrative dealt little with wastewater operations; concentrating instead on deflecting criticism, excusing his own perceived underachievement, claiming mutual misunderstanding with Hickey, and saying Hickey’s own stalling or lack of guidance were to blame. Hickey replied to Bull’s response by memo dated November 8, 2001, which read:

“I have reviewed your rebuttal to your recent evaluation. Your rebuttal appears to evade responsibility, and leaves out material facts. It would not be productive to get into a debate at this point. The performance evaluation and your rebuttal, identifies the areas you must concentrate on. Your rebuttal will be placed with your performance evaluation in your personnel file. I expect you to achieve a satisfactory performance rating in your next evaluation scheduled for May 1, 2002. I know you can do it, if you focus and develop a positive outlook.”

Hickey testified to a collateral event affecting WWTP operations and staff. Hickey termed this, “. . . another issue that had come to my attention shortly before that [completion of the third evaluation].” It caused Hickey to implement an immediate removal of Bull from running the sewer plant any longer.

The point warrants quoting his testimony verbatim:

“. . . I had Roy Mora and Larry Johnson in my office. And Roy had complained that Ken Bull had commented to Larry Johnson about Roy not going to make it. Roy was very upset and agitated. I talked to Larry Johnson, and he confirmed the statement.

And so then I had another issue that I had to look into that was an issue that, in my opinion, possibly could result in a hostile work environment situation that would have been created. The part of that investigation required me to talk to one of the persons who was not available, and that was Adam Blue, and Adam was not available for a period of time. He was out on workmen's comp. Issue. He did not return to work until October 30th. I needed to talk to him to complete my investigation of that. And after I talked to Adam, Adam confirmed that Ken had made the same statement to him.

I then talked to Ken, I believe it was November 1st, and Ken's comment to me when I confronted him with this, asked his opinion, his input, he said, well – something to the effect, well, I don't recall making it, that statement, but if I did, I'm sorry.

I felt at that time Ken had created a hostile work environment out there, and I needed to make some accommodations to ensure the water would still flow, wastewater treatment plant was still going to operate. And I had to kind of resolve this hostile work issue, that environment that Ken had created, so I had to – I felt I had to take that action.

. . . bear in mind at the time that I made that decision, the wastewater plant was still, that I know, operating fine. I knew of no ongoing violations out there. I had no reason to challenge his expertise as a chief plant operator. I was just focused on the hostile work environment issue and wanted to take the minimum actions necessary to resolve that issue.

You have a brand-new person who is there approximately one week and Ken goes to a subordinate, another subordinate and starts talking about what about so-and-so, I don't think he's going to make it. What do you think? It's totally an inappropriate comment. Now it comes to the attention of the other individual, he's upset, very small shop, his supervisor's walking round making this kind of comment to the other workers. It was a setup to fail.

Ken's position would require him to evaluate people, but there's a difference between evaluating people and walking around and making these kinds of comments that incite.”

Bull's recollection of these eventful times is that on or by the third day following mutual sign-off on his "Unsatisfactory" rating, Hickey informed Bull that he was no longer in charge of the plant, that he should stay away from it, and have no further role in wastewater treatment operations. An awkward transitional period then followed as Johnson and Mora simply improvised needs of the plant, and succeeded well enough by their growing experience until Klever's arrival.

FURTHER RELATED EVENTS OF LATE 2001 – EARLY 2002

Larry Johnson testified that upon starting work at the wastewater treatment plant in September 2001 he initially teamed with departing employee Art Gordon. However he received no job training from Bull, who he knew to be the chief plant operator. To emphasize this isolation, Johnson recalled that after only five days on the job he felt "... on [his] own." He knew from early on that governmental guidelines were contained in official operating permits. However his initial awareness was only as to regulated chlorine levels of the process, but with no inkling of BOD, Total Suspended Solids, or pH requirements.

Johnson soon learned how the plant's chlorine contact basin was the feature where wastewater was purged of harmful bacteria with a serious dosing of chlorine. This step is an important sampling point; one that is also laboratory tested for coliform content. According to Johnson, Bull once asked him to heavily overdose the basin with chlorine. This would produce an artificially low feces sample reading for entry onto the DSMR of that date. Johnson simply declined the request, believing it to be both unethical and possibly criminal to do. He then reported the episode to Hickey, however there is no evidence of what use this information was put to by the City Manager, or the influence it may have had on his further actions.

Roy Mora testified that he, too, did not receive training from Bull during his early span of employment as begun in October 2001. Rather, he initially learned details of the operation from Johnson "showing me the rounds." Mora specifically denied getting any information from Bull about the City's discharge permit requirements for treated wastewater, although he knew generally that the plant was closely regulated by both state and federal authorities. During his break in time to the job, Mora knew only about applicable limitations of (1) an allowable daily chlorine residual maximum of 0.05 mg/l, and (2) an allowable daily effluent total organisms content maximum of 500 MPN(*most probable number*)/100 ml for coliform. Mora later signed DSMRs for months of November and December, 2001, but without entering a formally required certification by the signatory.

Shortly after Dale Klever was hired in January 2002, Hickey notified Escarda at the Sacramento Control Board by letter dated January 24, 2002 that Bull was relieved and Klever was serving as the City's new Chief Plant Operator. Klever testified that his introduction to the new job was becoming familiar with Control Board Order No.99-009, including its vital Cease and Desist provisions. This was the only one that he had come across, and this by mere happenstance.

However, Klever's confidence in successfully running the plant during his initial months brought unintended complacency, obscuring the fact that Klever was unaware of numerous instances of noncompliance during Bull's earlier tenure.

In his predictably active manner, Klever promptly initiated informational morning meetings of wastewater plant employees. In the course of these he was not informed by Bull of existing Order 99-008. He particularly recalled Bull being the most passive participant, and as among all such employees speaking the least. This lack of advice from Bull caused Klever to believe, as did Mora, that a maximum daily allowable chlorine residual level of 0.05 mg/l applied.

The fact was that Order No. 99-008 set this allowance maximum at an hourly level of 0.02 mg/l, coupled with a weekly level of only 0.01 mg/l. This exemplified the situation of Klever overseeing an operation that perpetuated noncompliance, even as he sought to assure fully correct records of wastewater treatment. But in less than six months Klever was shocked to learn that the Control Board had issued a stinging Notice of Violation respecting the City's sewage plant. Klever's objective of operating in full and appropriate compliance was then fully taxed, as he urgently applied his policy of analyzing, reacting to, and fixing all reported problems over the course of mid to late 2002.

For his part, Bull abided Hickey's edict that he stay clear of WWTP affairs. From roughly early November Bull performed only miscellaneous office work at Hickey's periodic direction, plus engaging in general Public Works activity such as road patching and meter installation. There is no indication that an actual pay reduction accompanied Bull's abrupt removal as plant chief, and reclassification to Maintenance Worker III. I do note that on November 17, 2001 Bull signed for the October DSMRs. However in this one instance it was done at the request of remaining plant operators Johnson and Mora, and merely as a transitional act. The stark fact remains that for nearly a year's time Bull's work assignments were strictly in Public Works functions other than any kind of duties at the WWTP.

THE NOTICE OF VIOLATION

On June 17, 2002 the Control Board made an inspection of the City's wastewater treatment plant. The inspector was Water Resource Control Engineer Melissa Hall (Escarda's successor), who was accompanied for this undertaking by her colleague Dan Wolfe and by Klever. Hall completed a 13-page Report to the Control Board dated 3 July 2002, referencing the last comparable inspection as having been in June 2000. Her Report contained samplings of BOD, TSS, pH, coliform, chlorine, and the conditions found to exist in other regulated aspects of sewage plant operations.

Hall's Report was appended to a "Notice of Violation [etc.]." The Notice itself, communicated by letter dated July 9, 2002 from Control Board Senior Engineer Richard McHenry to Klever as City "Public Works Supervisor," was a 9-page document, keyed to then-current reporting by Hall and as a stricture based on Order 99-008. The long Notice of Violation was almost exclusively devoted to

recitation and tables based on the Control Board's review of (DSMRs) submitted for the months of August 2000 through May 2002.

The Control Board's review identified what Klever later tabulated as a grand total of 249 over limit readings for the span of months in question. The Notice requested a technical report from the City by 10 August 2002, to include an explanation why the violations occurred and meaningful plans for corrective action.³ Furthermore, the Notice of Violation was copied to 10 agencies or individuals, ranging from the EPA, Region IX at San Francisco to the public watchdog "DeltaKeeper" at Stockton, California.

AFTERMATH TO NOTICE OF VIOLATION

Hickey testified how the Notice of Violation shocked him by its sudden and totally unexpected appearance. As City Manager he mounted an immediate response, coordinating closely with both Klever and the recently hired Linhart. The City first stopped WWTP discharging, and followed this with parallel activities of planning a suitable resumption of normal discharging while also preparing a needed response to the Control Board.

In addition to these steps, Hickey pondered how WWTP operations could have become so deficient with such extensive out-of-tolerance test results.. He undertook close examination of Bull's DSMRs for the approximately two year period of the Control Board's survey. Hickey previously had only sketchy awareness of these daily reports, as, for example, when one or more would be used for reference during his periodic performance evaluation discussions with Bull. As investigation into circumstances of the extreme setback proceeded, including taking of written statements from both Johnson and Mora, Hickey became increasingly gripped by the sense that punishable fault was present.

On September 10, 2002 Hickey and Linhart met with Bull as investigating interviewers, and put 14 incisively drafted questions to him about background and circumstances leading to the Notice of Violation. For this recitation of facts to continue, it suffices to take only three of Bull's recorded responses.

For question 4. Bull answered that as early as August and September, 2000 he was "aware of very few" instances when TSS, BOD and pH readings exceeded permitted amounts, and of associating this to a point in time "after the clarigester went offline." For questions 6 – 11, these relating to whether, how, and when he extended early job training to Johnson and Mora, Bull answered

³ Hickey later made the requested "technical report" as a formal, 15-page Response to McHenry, dated September 16, 2002 (with selected appendices of laboratory test results from late 2001). From the extensive content of Hickey's Response, I here extract only the portion in which he writes, " . . . the majority of these violations were caused by a sequence of events that date back to the tenure of the previous chief plant operator [as] deficiencies occur[ring] under his tenure [that] had a domino effect [on other WWTP staff]."

(1) that it was whenever they asked for information, (2) that he believed a fully experienced operator who departed in fall 2001 acquainted them both with requirements of the plant's operating permits, and (3) that he personally extended other training in "the time he had left" but without remembering any specific dates this was done.

By Memorandum dated September 11, 2002, Hickey then requested immediate written "Clarification of knowledge of permit violations." Bull complied with a hand-written letter dated and received in City offices September 11, 2002. His letter made three points in reply; (1) that "mechanical problems" forcing the clarigester to go offline after February 2001 may have created increased violations, plus he had noticed unfavorable laboratory analysis numbers at about the same time, (2) that laboratory results giving "a clue" of over limit BOD and TSS readings lagged by a whole week from the samplings, so as to "conceivably" mean any problems could be cured simply by this passage of time, and (3) that if violations before February 2001 were being currently deemed so significant they should have been "brought to our attention" by Escarda or an area engineer.

Bull's reply was apparently of no avail. By hand delivered letter dated September 13, 2002, Linhart (then titled Planning and Community Services Director) advised Bull of a proposed termination from employment as Senior Maintenance Worker effective September 25, 2002. The action was proposed to be taken "... for one or more of the following listed grounds":

- A. Unexcused neglect of duty.
- B. Unsatisfactory performance.

A more specific group of reasons followed as (1) failure to inform WWTP employees hired after July 2001 that operating permit Orders Nos. 99-008 and 99-009 were in effect, (2) failure to inform the City's consulting engineer or its City Manager of the itemized violations listed in the Control Board's Notice, and (3) failure to provide adequate oversight and training to the two WWTP hires of September and October 2001.

Linhart's letter also alluded to Bull's unsatisfactory performance evaluations, and a written reprimand with associated one-day suspension regarding "... your employee performance." This reprimand and suspension referred to an incident in late 2001, when Bull accidentally or negligently backed a City truck against a public building causing damage. Continuing with its purpose, Linhart's letter stated that all documents supporting the proposed action were available for Bull's review, that he could object orally or in writing by September 25th and before final action, and that he had a right of appeal pursuant to City Rules.

Linhart testified that he came to a final decision that Bull should be terminated. It was based on the City Administration's investigation of what caused the Notice of Violation, including interview of WWTP staff members

employed from September 2001 onward. Linhart then prepared a letter dated September 27, 2002, but hand-delivered by him to Bull on September 22nd. As with his earlier letter dated 9/13/02, this one identified Bull by the job title "Maintenance Worker III." Instead of proposed action, the new letter explicitly advised that Linhart was terminating Bull from "... your position of Senior Maintenance Worker, effective September 27, 2002." In appearance the new 3-page letter was much like the earlier one, and in fact was the proverbially 99+% identical in its content and phraseology.

Linhart testified further that Bull desired to respond to notice of his termination, and did so sequentially with a partial draft and finally a 4-page letter dated September 24, 2002 (oddly addressed to Control Board Senior Engineer McHenry). The essence of Bull's reply here was to traverse and rebut what Hickey had just extensively written to McHenry by date of 9/16/02, and in which he challenged and explained otherwise what Hickey had written under headings **Reorganization and Personnel Changes** and **Findings and Recommendations**. (See footnote 3, above). Bull closed his reply with a short "Summary" of three rhetorical questions intimating that he should not be viewed as a person at fault. Notwithstanding, and perhaps with a slight hitch in its effective date, Bull's termination from employment went through. Soon afterward, the City accepted a late appeal notification from Bull, contained in a brief memorandum received October 11, 2002. In this notification Bull alleged the City failed to provide him a "SKELLY HEARING," as legally required for his termination to be a valid one.⁴ Ultimately, a supplementary answer to charges and request for arbitration was sent to Hickey by letter from Timothy Young, a Sacramento law clinic attorney.

FURTHER TESTIMONY SIGNIFICANT TO REACHING FINDINGS OF FACT

I referred above to eventual treatment of the respective "versions" from Bull and Hickey as advanced in their testimony. This touches on each of their recollections, taken far beyond several periodic performance evaluation exchanges. The recording and retention of these evaluations is there to read, and it contains considerable detail as to remarks, events and viewpoints, particularly from Hickey as the more extensive writer.

Valuable as these and other documentary evidence might be, I am impressed that more compelling truths lie in the many and varied conversational exchanges between Bull and Hickey as they randomly, or by prearrangement, kept tabs, or attempted to do so, on operational problems, adjustments and general realities of the critical public function for which they each had their own specific role. Here is the place to bluntly set forth the stark utterances of each person; leaving factors of weight and credibility for later treatment.

⁴ Bull's reference is to a doctrine based on *Skelly v. State Personnel Board*, 13 C.3d 194, a case decided by the California Supreme Court in September 1975. Briefly, the doctrine creates due process rights for a permanent civil service employee, as a person having a property interest in employment. *Skelly* shall be discussed further in a separate section of this Decision to follow.

The context of Bull's dealings and communication with Hickey was largely influenced by his own past experience in wastewater treatment operations. He told of practices at the plant where previously employed, that provided him with useful knowledge only as to the subjects of BOD and TSS.

Because of this, Hickey's first set of performance evaluations have limited value to resolving issues of the case. This first annual period for which Hickey evaluated Bull included over three months before Hickey had even assumed his top City position. Secondly, it must be remembered that Bull's position was a multi-functional one, touching most of the common and highly visible public services provided throughout this municipality. Thirdly, Hickey's initial formal evaluation of Bull largely emphasized administrative skills, his efficient work scheduling of employees and assuring their regular exposure to training. This evaluation contained comments and goal-setting phraseology ranging from a Beautification project to needed establishment of a "Hazmat" program. Finally, I observe that in setting goals beyond the first rating period into midyear 2001, Hickey's only technical goal for Bull in WWTP operations (and by rote repetition in two later evaluations) that Bull achieve "No out of tolerance results from sewer testing (chlorine or bacteria results)."

The first evaluation was signed by each party on 9/8/00, nearly a year after Hickey had commenced his leadership of City affairs. Its nature as a marginal appraisal of Bull has no real significance to this case, although ironically the Control Board later came to issue its Notice of Violation and related analysis that began with August 2000 just as the first annual evaluation period ended.

The second evaluation, producing a favorable appraisal, was for an 8+ month time period. It warranted a small merit pay increase for Bull, thus signifying a satisfactory City employee at that point in time. Certainly that appraisal was influenced by Hickey having been continually unaware that a definite pattern of permit violations were being reported on DSMRs without repercussion from the Control Board's office. Indeed it was here that Hickey proudly commented "... there have been no chlorine out of tolerance test results during this observation period." In fact there were two such over permit instances; one in each of the months October and November 2000. Bull has categorically denied giving Hickey any reason to write that statement. But Bull has not explained, nor was he questioned at hearing, why he acknowledged the evaluation by signing it and allowing such gross misconception to stand.

In numerous conversations between Bull and Hickey during 2000–01, the former provided scant or deflection answers to Hickey as to whether the City's WWTP was operating compliantly. He often explained that deficiencies resulted from his own lack of knowledge about specifics of equipment or the chemistry involved. More surprisingly Bull simply concealed some circumstances, such as with his testimony that he disclosed only a portion of "the entire magnitude" of violations taking place.

Early in this time period, Bull originated a theme that he frequently turned to. This was to note that Control Board regulators made periodic plant visits, but which did not result in Bull learning of any “feedback from the state” concerning the evident problems. Bull claimed that he immediately telephoned each out of tolerance instance to Sacramento, remembering how “. . . they always seemed to be very happy I was calling them.” Besides this impression, Bull reinforced his sense of satisfaction by thinking, “. . . the state knew what they were doing.”

Hickey’s role in this pairing of divergent styles was to persistently seek answers to his general sense, and to learning of specific puzzling disclosures, that revealed a WWTP operating at marginal levels or worse. Regardless of how well focused Hickey might frame his questions, he recalled that Bull often came up with frustratingly bland responses. Hickey testified how these answers “led me to believe that the plant was still running maintained within compliance.”

As to this salient time period of 2000-02, he was given absolutely no hint that “. . . the plant was running contrary to the permits in the fashion that we have been talking about in this hearing.” Hickey’s summarizing colloquial offer about just how communication with his chief WWTP contact person left him, was the now-ironic declaration from the witness stand that because the City WWTP was “one area that I felt was really under control . . . I slept really good at night.”

It is more than speculation to wonder just how much the crisis presented to those involved by McHenry’s Notice of last July 9th was rooted in mis- or non- communication between the WWTP’s Chief Plant Operator and his City Manager. Bull’s witnessing for himself in this matter was rather a wash, as he larded his testimony with numerous “don’t know(s)”, “don’t recall”, shameless admission of inexperience, or just plain deception. Hickey, on the other hand, spoke with an air of complete confidence in the pure truth of his own statements.

But even here his manner of speaking was often ineffectively inquisitive, only imploring Bull to divulge the realities of WWTP operations by use of faintly hackneyed or fashionable expressions. (Quoting Hickey: “strive for perfection”, “keeping me in the loop”, and “road map for successes.”) These may have missed their mark as effective guidance in the face of Bull’s willingness to soldier on; satisfied with his own perplexity and indifference.

Suffice it that these two individuals faced a mutual “Administrative Responsibility”; that to “share joint responsibility to insure conformity to and enforcement of the provisions of this Resolution.” – essentiality to achieve efficient conduct of “public business” (City Rules 3.3 and 1.1, respectively)

But the Notice of Violation abruptly shocked and devastated Hickey; left a similarly shocked Klever “ashen”-faced, generated much larger and ominous questions of a community’s financial liability, and dictated wise altering of WWTP operations to best assure safe and reliable public service for the future, as well as reassure the layered authorities having oversight that this essential function had recovered to a point of normalcy.

III. – ISSUES AND CONTENTIONS

The issues that emerge from entire background above are:

1. Was the termination of Bull for good, reasonable or sufficient cause?
2. If 1. is affirmative, did the City comply with Skelly doctrine?
3. If 1. is negative, what arbitral remedy should be fashioned?

Bull, by counsel, contends that (A) the City terminated Bull from a job classification which he had neither held nor actively performed for nearly a year; (B) the City recognized principles of progressive discipline but did not follow them; (C) official job performance evaluations recorded for Bull were colored by the City Manager's animosity toward him; and (D) the City failed to provide an applicable Skelly hearing. This last point "D" is that Bull's reply to the charges that proposed his termination were not given fair and legitimate consideration before " . . . a reasonably impartial, noninvolved reviewer . . . as required in Williams v. County of Los Angeles (1978) 22 Cal.3d 731, 737.

In oral summation, Bull's counsel said nothing inconsistent with a pre-hearing brief, but emphasized a principal contention that Bull had not gotten his "due process rights." Counsel also alluded to "damages" as Bull's further entitlement, and calculated these as \$17,900 in back pay, an apparent item of \$4,700 for benefits that would probably be returnable to California's Employment Development Department (EDD), and attorney's fees. Bull's counsel objects to any claim by the City of setoff from back pay, because *bona fide* "mitigative efforts" had been unsuccessful. Bull's total claim is for \$28,000 (rounded).

The City, by counsel, contends as to merits of this appeal that Bull plainly had engaged in heedless inaction, compounding deception, and pure concealment with respect to the stringent expectancies of that person chiefly responsible for assuring integrity in all the functioning of public sewer service. Sole blame for the widespread operating violations should be placed on Bull, and extreme financial exposure now haunts the City. Bull's neglect in training subordinates and feeble job performance is pointed to as why the City is now facing a regulatory fine that could reach "a minimum of \$500,000.00."

The City points to an inexcusably alarming untruth occurring as conversation unfolded when Hickey presented his second evaluation. During this episode Bull was to have categorically denied any presence of prohibited chlorine infractions, whereas there were actually three.⁵ Bull's conduct is equated with "particularly egregious" behavior by a key worker. The City cites Kazensky v. City of Merced (1998) 65 Cal.App.4th 44 in support of this summarizing contention.

⁵ City counsel's brief asserts there were 20 chlorine violations during this June 2000 to February 2001 period; however available DSMRs in the record only display three of the chlorine category.

Addressing the Skelly issue by a separate brief, the City assumes Linhart to be an eligible Skelly Officer, and cites various authority in arguing the doctrine has been satisfied. Primarily among these is Burrell v. City of Los Angeles(1989) Cal.App.3d 568 suggesting Linhart was an eligible reviewer, even though he had “assisted in making the rating” that led to adverse employment action. The City also relies on Coleman v. Regents of University of California (1978) 93 C.A.3d 521, 525-26 and Coburn v. State Personnel Board (1979) 83 C.A.3d 801, 805-807; both cases advanced to show the City’s compliance with notice and right to respond aspects of what Skelly also requires.

IV. – CONCLUSIONS OF LAW

NATURE OF THESE CONCLUSIONS

This segment of my Decision is headed as shown because of a literal term in City Rules Section 17.8 A., quoted above. As an arbitration matter, here and typically, any discrete portion of an arbiter’s work product which (1) describes significance of primary evidentiary facts, (2) draws inference(s) based on circumstantial evidence, (3) gives reasons for judgmental direction of the case, or (4) applies broadly held rationales, is legalistic in nature.

However here the format shall be running narrative, and not structured as legalistic “conclusions of law” often manifest. I do not believe the distinction warrants more verbiage than to make note of how I view this segment. The spirit, if not the letter, of City Rules Section 17.8 A. is being fulfilled; otherwise the purpose of entire Section 17.0 would be impacted.

DISCUSSION

There is no controversy concerning any of the numerous DSMRs in the documentary evidence of this case. Nor does Bull, through counsel, take issue with correctness of the much more numerous readings, samplings, notations, and results shown on these DSMRs.

For the period August 2000 through October 2001 period, a pertinent time of Bull’s active WWTP supervision, these DSMRs were exclusively signed by him. Each such signature certified his best knowledge and belief as to “true, accurate and complete” information, knowing that penalties could obtain for submitting false entries.

These reports invited comments and notations by the certifying official. In practically every instance Bull entered additional information along those lines, often equipment status, nearby physical or community factors and miscellaneous variations to usual wastewater treatment practice. Overall, the batch of DSMRs available to examine shows Bull’s attempted regularity at fulfilling all reporting requirements, and making modest efforts to highlight noteworthy conditions each passing month.

But attempting to achieve one's duties is not the same as accomplishing them. Many of Bull's numerical entries are far off an accurate arithmetic mark, seeming quizzical at best and sorely careless at worst. Examples of this are found in DSMRs for March 2001 and June 2001, where he simply made wrong calculations for reportable readings concerning TSS and BOD, respectively.

Johnson was an earnest-seeming witness, who convinces me that Bull also gave him reason to think an irregular stopgap should be tried. This scornful idea was to artificially show coliform compliance by overdosing a holding basin with chlorine. Proposing such a device shows both that Bull looked lightly at his WWTP responsibilities, but also was candid when repeatedly explaining to Hickey that he admitted to insufficient knowledge of this demanding occupational specialty. As to the incident itself Bull does not admit it happening, only that he cannot remember whether or not it did. But I give credence to Johnson's firm testimony that he reported this seemingly improper approach to Hickey. There is no evidence that the City Manager took the particular matter any further.

I also fault Bull for laxity in providing effective orientation as Johnson and Mora became increasingly involved in the operation. Johnson credibly testified that accuracy of WWTP reporting suffered when his first week on the job yielded training only from experienced, but departing, operator Art Gordon. Johnson thus struggled to apply only Order 99-009, with its ambiguously stated limits on chlorine residual.⁶ Essentially Johnson was required to guess at what the valid test numbers were at various steps along the wastewater treatment process. Guesswork is not a tolerable expedient when critical public welfare is involved, and this makes more vivid the reasons that Hickey repeatedly sought to improve WWTP operations by elevating the managerial and leadership skills of his chief plant operator.

In general, Bull did not succeed well in a relatively long tenure. However the issue here is that established in City Rules, and there the borrowing is from classic labor arbitration doctrine. This is clear and compellingly shown as the drafter's intention, when "good" and "sufficient" cause must be established for discipline to be valid.

Bull was in possession of, and conversant with, Control Board Order Nos. 99-008 and 99-009 as he carried out his work from a time even before Hickey arrived to become City Manager. Order 99-008 was the basic operating permit when issued, and it also expressly rescinded a much older Order No. 93-021 in which differing limitations had appeared. From the time in fall 2001 when new operators Johnson and Mora were hired, and even coextensive with Bull's

⁶ Escarda had verbally authorized that a printed entry on Order No. 99-009 could be disregarded, and an authenticating hand-written notation to this effect was shown on the page. An hourly average limitation for chlorine residual of 0.02 mg/l was to be ignored, however no substituted figure appeared in its place. Compounding this was an inadvertence on the same page of Order 99-009 in which the weekly average limitation for chlorine residual was expressed in tenths, not hundredths.

third job performance evaluation, he had failed to disseminate the fundamental Order No. 99-008 to them. These supervisory failings specifically had been noted as instances of “Unexcused neglect of duty”; one of the grounds for termination in Linhart’s letter that first proposed such action.

I believe Bull’s deficiencies intertwined with other factors that together resulted in the stringently authoritative Notice of Violation. The role of Escarda as affecting this entire case cannot be overlooked. I make no criticism of her, and indeed have no evidence to even think that I should. The fact remains that Bull credibly testified to frequent telephone contacts with her. In the course of such discussions, he was given to presume that a key functionary of the powerful Control Board could just permit a continuous arrayal of operating violations to continue with cavalier, or at least disdainful, disregard. Bull also credibly recalled that at a point in time “under [his] watch”, therefore generally 2000-01, Escarda had twice appeared at the WWTP to observe and take random samples. This fact well illustrates the close dealings by which Escarda would acquire familiarity with conditions at Live Oak’s Discharger. Additionally, Klever chimed in on this aspect under cross-examination by Bull’s counsel. The verbatim exchange is:

Q “. . . then the state does their own check on that [waste discharge requirements], I suppose, they have their own counterpart that looks to see if everything is in compliance, correct?”

A. “Well, Christyl clearly didn’t for over two years” (Tr. 125/7-10)

This significance of entire happenings as described just above could not have been lost on Bull. Besides the anecdotal events, the Control Board’s office at Sacramento was receiving DSMRs regularly over the entire 1999-2001 timespan. Escarda herself was its chief reviewer. The operating goals set forth by Hickey for Bull in near-annual performance evaluations, and by ordinary remarks made sporadically around the work setting, gave Bull one persistent viewpoint on how he should function. But against this, and obvious weight of knowing he was instrumental in fulfilling a vital and intricately regulated function, Bull succumbed to another motivation. This line of least resistance – so to speak – was to obtain, record and transmit WWTP data that revealed sweeping noncompliance yet drew no immediate repercussions.

This unsavory dilemma finally found its own solution with Bull’s removal as CPO and Klever eventually acceding to the position. Klever’s principled style and Grade IV competence soon supplied satisfactory levels of compliance. But the many violations of earlier times remained easily dredged up, and indeed were so after the telling replacement of Escarda by Hall (apparently occurring in 2002). The prior situation, to again quote Klever, was an ever present threat to the City, as having “. . . gone back for months and months and months and months.” It is not my intention to excuse Bull from his demonstrated deficiencies and devilish avoidance of candor with his superior. It is instead to reiterate that Escarda’s role in this entire picture should not be overlooked.

If Bull's weak supervisory skills were not enough to plague this operation, other realities are treated in the record of this case. Principal among these was the existence of serious equipment problems, impetuous chemical tinkering and fudging, plus an intrinsic difficulty in producing exact measurements for a DSMR.

The situation of the plant's clarigester is a sorry story. It was operational when Bull started in the WWTP function, however it was a machine he had never confronted before and admittedly knew little about. He testified to setting about with needed repair, but these were ineffectual. Looking back, he recalled that a skimmer arm replacement plus repair of a defective valve had been needed. Bull had excuses for not solving these needs. But no credible explanation was offered other than that he was apparently simply derelict.

Hickey's Response of September 16, 2002 to the Control Board also sheds some light on this subject. In this Response Hickey refers to the clarigester as one of two major "[B]ackground issues" identified to have mainly caused the violations. Hickey approximated the clarigester going off-line in March 2001, and remaining that way at least through the rest of 2001. He explained how the clarigester's manifold became clogged with sludge, causing its sweep arm to jam and bend. This diverted raw sewage directly into the first oxidation pond, and had serious adversity to treatment processes beyond. Hickey specified that on August 9, 2002 the clarigester returned to normal service. The subject resolved itself, as Klever forthrightly explained, by him turning back on long dormant controls after repairs were done.

In August 2000 an uncharacteristic upsurge in pH and other violations caused Bull to begin experiments designed to cure such problems. He began by raising and lowering pond levels, an adjustment that can take up to a month to best evaluate resultant changes. This led Bull to introducing acidic chlorine into the treatment process for better coliform compliance, however that led to residual chlorine excesses. Bull attempted to achieve balance by dousing the wastewater flow with alkaline bisulfate. This often resulted in elevated pH readings, and the situation became one of many for which Bull habitually alibied to Hickey.

In one line of questions to Bull, it was posited that even upon 30 (or even up to 60) days of pond level adjustments why were violations not reduced from use of this technique alone. Pinned down by the question, Bull's answer shows the coy and deceptive way he had of deflecting inquiries. Here Bull explained that during his basic "watch" over plant operations he had only "limited" staff, and not the "luxury" later enjoyed by Klever of "John Linhart when he came on board." The fallacy of that is Klever's turnaround was well into showing results long before Linhart came with the City in July 2002, yet the Notice of Violation which triggered all of this was expressly based on a review of discharge processes only through May 2002. The "luxury" referred to as Klever's supposed benefit thus

disappears into a haze, alike, but of different character, to Hickey's pretextual ploy about hostile work environment.⁷ Bull does, however, reap some vindication for the thought for an unrelated reason. By a March 6, 2002 memorandum, referred to, but not entered into the record, Hickey had authored a forward planning document for potential internal reorganization. It contemplated a new Maintenance Worker III position, preferably staffed by a state certificated Grade III person, plus the hire of a professional "planner and public services director" (ultimately represented by Linhart). This point provides a hint that the WWTP function may have been perceived as understaffed during the time Bull was in charge.⁸

The manipulation of pond levels for possible solution to many of the out of tolerance conditions also associates to the question of whether Bull really attempted to inform Hickey of a poor status to the operation. In typical coy and oblique fashion, Bull testified to just how he kept Hickey posted – by indirectly advising him of a portion of violations – in the "entire magnitude" of things. Also, Bull claims to have suggested that the City Manager could obtain more information from reports to the state, including laboratory results, all of which were "stored at city hall"

Hickey did not concede that Bull had so recommended, or that he had prior reason to research. However, his curiosity was piqued from being present in this case hearing's first day of early March 2003, so he had "walked around and looked in [city hall] offices", but "still don't know where they're at." Finding such reports did not seem so daunting to Klever however, who testified that while perhaps not easy to find he certainly "could have gone to City Hall and hunted."

Hickey recalled hearing about Bull's jibe toward newly-hired Mora, which he immediately dubbed as creating a "hostile work environment." This phrase has a long history in employment relations parlance. Bull's remark, assuming it was truly made, with the centrally worded "won't make it" utterance, is itself casual and vague, hardly warranting the reaction that Hickey gave it.

⁷ In the course of Hickey's long and fascinating testimony about creation of a hostile work environment, he does express having "no reason to challenge [Bull's] expertise" (quoted above); a telling inconsistency when compared to deep and extended concerns for Bull's proficiency and performance as described and recorded by Hickey in so many ways before.

⁸ This whole configuration of evidence also associates to disclosures during the post-Notice of Violations days, and particularly the interrogating written questions asked of Bull by the City Administration investigators (Hickey and Linhart – Questions for September 10, 2002 meeting). The last segment of these questions (given number 14) was actually an ending opportunity for Bull to add or say anything more. Predictably Bull responding saying (1) he wished having had more time devoted to the plant, (2) he regretted having been "spread so thin." and (3) he thought he asked for more help three times from the city manager. A short, free-floating supplement written by Hickey closed the transcript of interrogatories of 9/10/02. It read: "When I mentioned the City brought on James Carr, (Grade III) in [December 1999] and reorganized public works to make him a lead the following year, Ken: *responded by stating although James did an excellent job, he was insufficient to the staffing needs – particularly after he [James] left.*"

A look at chronology surrounding the episode shows that Mora, at least a once certificated wastewater treatment operator, had only arrived on the job that October 15th, and Bull was relieved from further responsibilities in this area only two weeks or so later. Assuming that there was some deficiency in Mora's work, it would seem unlikely that Hickey would elevate it to the point of abruptly severing Bull from any further participation in WWTP operations.

Hickey had, after all, just completed a largely critical review of, and formally recorded dissatisfaction with, Bull's performance. Further, Hickey testified that he "did not place much credence or credibility in it [Johnson's report about Bull's remark]." Why would he fail to place credence in Johnson, a person who by that point in time had completed about a month of satisfactory service? To say that Johnson lacked credence, is to say that Bull was the more believable person; a result wholly at odds with all that Hickey had experienced in frustrating dealings with Bull over a two year span. And finally, why did the entire subject of "hostile work environment" even come up when it did; that is practically at the end of Hickey's testimony about the case as a whole? I believe it was a sudden afterthought of Hickey, put into play as an attempt to buttress what Hickey surely would have recognized as a need to justify an employee's termination when the entire circumstances leading up to it reeked of pretext.

I believe a specific reason drove pretextual action in this case. It was to focus blame on one person for the dire possible consequences of the Notice of Violation. If successful, such a pretext would shield all others from criticism for the inescapable fact that a massive failure in running this WWTP had been unearthed and ominously presented (Hickey claimed to have been in discussion about the City " . . . facing fines of \$500,000, possibly more . . . "; however no real evidence of this crushing financial prospect was presented),

One need only read Hickey's "Response" of September 16, 2002 to the Control Board's Notice of Violation, to see how a theme was developing that would place blame for the situation squarely and solely on Bull. Hickey's "Response" was long and detailed. It provided what was reasonably called for when McHenry had unequivocally sought a full reply to the Notice.

Bull merited criticism; that much is clear. But in Hickey's Response others (Johnson and Klever) were associated to inattention and oversight. Why then was Bull solely held culpable? I believe the answer is expediency. Bull was both vulnerable for having spawned the many violations, and long removed from the operation and thus subject to termination without sudden disruption to the plant's continuity. Bull was, fundamentally, an easy and convenient target. Hickey's Response cleverly lulled readers into seeing a picture where a majority of total violations dated back to Bull's long tenure and a sequence of events. However, this facile reference to a "sequence of events" gave no hint that the sequence

itself undeniably involved others, including Escarda and Hickey himself, on staff City Engineer Ray Rose⁹, and the City's established WWTP Chief Operator.

Such ambiguity, quirks, and voids suggest that in this overall process of Decision on Bull's appeal, there is some modicum of blame, and not exclusively as to Bull himself, that may be spread around in terms of authenticity, precision and completeness of what is advanced as fundamental and relevant facts.

The matter of progressive discipline has been honed over a course of many years and countless arbitration decisions. It plainly means just what both Hickey and Mackowiak testified it to mean. However, the question is how is it to be applied? To the extent that Hickey took adverse action on or about November 1, 2001 this was, at the time, an incident of discipline. To that extent Bull was reduced only in rank, even if not immediately in actual pay.

I note, but discount, the minor vehicle accident for which Bull received one workday suspension in December 2001. During a string of leading questions while under redirect examination, Hickey stated this prior suspension was part of progressive disciplinary action involving Bull as an "honesty issue." Given great remoteness in time and subject matter of the suspension, I disagree that it should "count" against Bull in this case.

Bull, by counsel, has preserved a contention that his discharge is inherently invalid because rendered in relation to a position "that he did not hold at the time of his termination." The job literally referred to here is that of "Senior Maintenance Worker", this being the very same position Hickey had removed him from in any practical sense almost a year earlier. It is true, however, that both Linhart letters, 9/13/02 proposing termination and 9/27/02 effecting termination, addressed themselves to Bull as "Maintenance Worker III, although identifying the position to be terminated from as "Senior Maintenance Worker." I do not believe this odd ambiguity warrants further comment, except to write that it certainly does not help the City's case here.

Aside from comment above about inferred pretext, and the many factual renditions about what really caused the Notice of Violations to issue, there remains an essential issue as to timing of this action. Assuming blame to be chiefly, if not exclusively, Bull's, larger matters of human resources management principles come into play. Nothing is really gained, or exemplified, by the harsh discharge of Bull nearly a year after he had commenced duties for the City totally apart from derelictions of the past. This is not a singular thought. I cite Zack, Arnold M., *Grievance Arbitration*, New York, NY, American Arbitration Association (Lexington Books), 1989, under "Timeliness of Discipline":

⁹ Rose had been the person accompanying Bull on a visit to Escarda at Sacramento to routinely obtain a plant operating permit renewal. While the case record does not have benefit of Rose having testified, Bull himself credibly recalled Escarda telling them not "to worry about meeting full compliance" until improvements of the plant anticipated for 2004-05 were in place.

“To impose discipline weeks or months after an infraction would constitute an abuse of the employer’s authority because it effectively would deny the employee, but not the employer, the opportunity to collect timely evidence of the impropriety of the employer’s action.”

This point of timeliness in imposing discipline is also authoritatively expressed another way. In Caveness v. State Personnel Bd. (1980) 113 Cal. App.3d 617, 627 the Court, in a Skelly context, wrote:

“What Skelly requires is unambiguous warning, that matters have come to a head, coupled with an explicit notice to the employee that he or she now has the opportunity to engage the issue and present the reasons opposing such a disposition” (Citing Coleman, above; emphasis supplied).

Alluding to comment immediately above, this nearly year-long hiatus in any disturbance to Bull’s continuing employment at the City is more than unhelpful to the City’s case here. It could be, were I to be pressed for a controlling rationale, perhaps a sufficient reason in itself to recommend reversal of the action at issue.

In conclusion, and for all the reasons above, I believe Bull’s termination was not by the good, sufficient, or just cause necessary to be shown in keeping with the City’s own Rules, Section 17.0

THE SKELLY ISSUE

In finding that Bull’s termination was done without sufficient cause, the Skelly issue raised and argued by counsel is made moot. The City Rules which govern this matter provide that the Live Oak Council may undertake a Section 17.8 D. review of this Decision. For that reason I add commentary on how I believe Skelly would have applied to the situation.

Skelly, a physician, had been employed for about seven years as a medical consultant with the California Department of Health Care Services. In this capacity he had status as a permanent civil service employee of the state.

In 1972 he was given written notice of immediate, but non-final, termination from employment. The notice specified three causes for the dismissal, all being of a behavioral nature. Skelly answered in protest, and soon appeared, with other witnesses, before a hearing officer of California’s State Personnel Board (hereafter “Board”). This person heard evidence, made findings of fact, and submitted a proposed decision to his Board. He recommended that punitive action against Skelly be sustained without modification. The Board approved its hearing officer’s entire proposed decision, denied a rehearing, and by all this brought finality to Skelly’s employment termination.

Skelly then sued for writ of mandate against the Board, and a trial court denied the application to set aside a job dismissal. On appeal to California’s Supreme Court a scholarly opinion was undertaken. Drawing guidance from

constitutional principles, a then-recent decision of the U. S. Supreme Court in Arnett v. Kennedy (1974) 416 U.S. 134, California's Government Code sections, and other legal precedent, the trial court was reversed and a remand was ordered.

In this ruling four requirements were established as a basic due process assurance for many public employees within California. These oft-quoted factors became the Skelly doctrine of "preremoval safeguards." They are, (1) written notice of the proposed [disciplinary] action, (2) reasons therefor, (3) statement of charges and copy of underlying materials, and (4) advice of a right to respond, either orally or in writing, to the authority initially imposing discipline.

Among cases soon applying Skelly, the California Supreme Court decided Williams v. County of Los Angeles (1978) 22 Cal.3d 731. Here the county had civil service rules, one of which dealt with "Release (discharge) of Unsatisfactory Recurrent (seasonal) Employees." Release from employment was authorized whenever a written performance evaluation report showed unsatisfactory service. A related county rule allowed a jeopardized employee to "review his rating at any time with any of the persons who have signed the report or who have assisted in making the rating." The Court believed that a person facing the fourth prong of Skelly doctrine had an implicit entitlement. It was to exercise their "right to respond," but only if it could be done "before a reasonably impartial, noninvolved reviewer."

This implied privilege was gravely weakened by disposition of the consolidated appeals in Burrell v. City of Los Angeles (1989) 209 Cal. App.3d 568, 577-79. Focus of the case partly involved due process elements of Skelly; namely "the right to a fair and impartial decisionmaker." Here bias or prejudice of the reviewer might be shown from personal animosity toward the employee, or having a financial stake in outcome of the decision to be made.

The Burrell court, at page 582, adopts notions that bias and prejudice must be established by clear, tangible evidence. Thus a party will not prevail by advancing only perceptions, appearances, or suspicions in attempting to disqualify a particular reviewer.

But Bull plainly testified that Linhart showed absolutely none of these traits. Bull's counsel makes a single, mild claim that Hickey tended to undermine Bull. But no proof of this is offered, and the Burrell refinement means that Linhart could, as he did, act as both reviewer of Bull's termination from employment and participant in the decision.

The upshot of this is my opinion being that the City fulfilled all Skelly requirements in its procedures leading to Bull's termination. However, it is an academic point, because my ruling is rooted in the governing language of City Rules.

REMEDY

Because Bull's dismissal is not sustained his reinstatement shall be made effective for Monday, September 8, 2003. Reinstatement is to the Maintenance Worker III position he last held while in City employment. The effective date of Bull's reinstatement shall be September 8th, or, if necessarily later because of workings of review proceedings pursuant to Cit Rules Section 17.8 D., then five (5) days following adoption of any reinstatement remedy by the Council. Back wages shall be calculated (and arithmetically reduced by ½) from his termination until such date as he actually resumes work.

I cause a 50% reduction in Bull's back wages because his laxity in principal management of a critical public service function, coupled with marginal indifference, in effect if not in intent, both contributed greatly to the crisis. City Administration sought periodically to resolve a mysterious situation, and better frankness on Bull's part could have aided the effort. I believe it is only fair that his monetary relief be limited in an equitable way.

A request is made to include attorney's fees in the amount of \$5,000.00 as part of a remedy running to client Bull. A general proposition in labor arbitration is that attorney fees are not to be awarded. Hill, Marvin I, Jr.; and Sinicropi, Anthony V., *Remedies in Arbitration*, Washington, D.C., The Bureau of National Affairs, Inc. 1981, page 205. A commentator has observed that this general rule of attorney fees not being recoverable, "... may account for the rarity of awards of attorneys' fees." Schoonhoven, Ray J. (Editor), *Fairweather's Practice and Procedure in Arbitration*, Third Edition, Washington, D.C., The Bureau of National Affairs, Inc. 1991, page 359. See also, Montgomery County Community Action Agency, 62 LA 1278 (Dworkin, 1974). The City's comprehensive procedures for handling employee appeals of adverse job action does not contemplate approval of attorney fees, nor do I see any extraordinary circumstances as to warrant that. Accordingly, I deny the pending request for an attorney's fee.

V. RECOMMENDED AWARD

Kenneth Bull is to be reinstated to his former position of employment, without loss of benefits stemming from his termination, and is to be reimbursed by payment of ½ the back wage amount that would normally make him whole.

Dated: August 1, 2003

DAVID G. HEILBRUN